UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

BERTHOLD NURSING CARE CENTER,
INC. d/b/a OAK PARK NURSING CARE
CENTER

Employer

and Case 14-RC-12485

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL NO. 655, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Berthold Nursing Care Center, Inc. d/b/a Oak Park Nursing Care Center, operates a nursing home providing long-term care and rehabilitation services for elderly residents. The Petitioner, United Food and Commercial Workers Union Local No. 655, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, seeking to represent the Employer's full-time and regular part-time Licensed Practical Nurses (LPNs). A hearing officer of the Board held a hearing and the parties filed briefs.

As evidenced at the hearing and in the briefs, the parties disagree on three issues: (1) whether the LPNs are statutory supervisors; (2) whether the in-service coordinator is a department head and therefore a supervisor; and (3) whether the only appropriate unit must also include the Registered Nurses (RNs). Contrary to the Petitioner, the Employer contends that the LPNs and the in-service coordinator are supervisors. If LPNs are not found to be supervisors, the Employer further contends that the only appropriate unit must also include RNs because all of the Employer's non-

department head LPNs and RNs are charge nurses and share a community of interest. The Petitioner contends the petitioned-for unit limited to LPNs, including the in-service coordinator, is appropriate.

I have considered the evidence and the arguments presented on these three issues. As discussed below, I have concluded that the LPNs are not supervisors. I have also concluded that the in-service coordinator is a "department head" but that the record evidence is insufficient to establish whether the duties and authority of the in-service coordinator make her a supervisor. Finally, I have concluded that the unit may appropriately exclude RNs because RNs are professional employees, the LPNs are not, and Section 9(b)(1) of the Act provides, in effect, that a mixed professional-nonprofessional employee unit cannot be the sole appropriate unit. Accordingly, I have directed an election in the petitioned-for unit of LPNs and I will permit the in-service coordinator to vote subject to the Board's challenged ballot procedures.

I. OVERVIEW OF OPERATIONS

The Employer operates a long-term care facility in St. Louis, Missouri. The facility is divided into two separate stations, Station A and Station B. Station A consists of A wing and an Alzheimer's unit, and Station B consists of B wing. The nurse's station is located at the center of the facility. The facility currently has approximately 86 residents, 40 in wing A, and 46 in wing B. There are approximately 100 employees, 7 or 8 of whom are non-department head LPNs, and 3 of whom are non-department head RNs. There are 36 certified nurses aides (CNAs) and 4 or 5 certified medical technicians (CMTs) who are currently represented by a union other than the Petitioner and are covered by a collective-bargaining agreement. The non-department head LPNs and RNs, the CNAs, and CMTs are all hourly employees. The hourly wage rate for the LPNs ranges from

$14.82 to $16.70. The current hourly wage rate for CNAs is $6.85. RNs earn between $21.50 and $22.36 per hour.

The facility operates 24 hours a day, 7 days a week. The administrator is responsible for the overall operations of the facility. The director of nursing (DON) reports to the administrator and heads the nursing department. The nursing department also has an assistant director of nursing (ADON) who reports to the DON. In addition to the DON and the ADON, the facility also has at least seven other department heads, stipulated by the parties to be supervisors, who work in other departments, including dietary, maintenance, and social services.

The ADON schedules the nursing department employees. The LPNs and RNs are assigned to Station A or Station B, and are assigned to one of three shifts: day, evening, or night. All the LPNs are classified as charge nurses except for the ADON, the social services department head, and the in-service coordinator whose status is in dispute. There is at least one LPN charge nurse on each shift. The three non-department head RNs, also classified as charge nurses, also work one on each shift. Station A usually consists of one RN or one LPN charge nurse, one CMT and three to four CNAs. Station B has either two LPNs or one LPN and one RN charge nurse, one CMT and three CNAs.

LPNs, as well as CNAs and CMTs, provide medical care to the residents. LPNs monitor the activities of the CNAs and CMTs to ensure residents are receiving the proper care in accordance with Federal, State and local regulations. LPNs make "action" rounds twice on each 8-hour shift, checking on the care of the residents. LPNs make notations on action communication sheets of any problems found during the action rounds. The LPNs then check to ensure the CNAs and CMTs have provided any follow-up care. LPNs also chart resident care, administer medication, including administering

medication through gastric or G-tubes, do treatments, and keep in contact with physicians. The ADON, like the LPNs, also makes rounds to check on the CNAs and CMTs to ensure the residents are receiving the proper care.

The CNAs are responsible for assisting residents with activities of daily living (ADLs), such as bathing, clothing, and feeding. CNAs also take residents' temperature and weight, and use various mechanical lifts to help transfer residents, or to rotate bedridden residents. In addition to performing the same tasks as the CNAs, the CMTs can also pass medications and take blood pressure readings. CMTs, like LPNs, can perform action rounds when the LPN is unable to do so. CMTs can note follow-up care that the CNAs need to perform to ensure proper resident care, and can check to see if the care is being provided.

The parties stipulated the LPN charge nurses do not transfer, layoff, recall, hire, or promote employees, or effectively recommend such actions. In addition, the Employer also does not argue in its brief, nor does the record reflect, that LPNs have the authority to adjust grievances. There is no record evidence the LPNs are involved in the contractual grievance procedure for CNAs and CMTs. In addition, the record does not contain any examples of LPNs resolving any particular grievance or dispute involving CNAs or CMTs. Thus, the supervisory criteria at issue are: assignment of work, responsible direction, discipline, suspension, discharge, and reward, or to effectively recommend such actions.

II. DUTIES OF LPNS

A. Assignment of Work/Scheduling

The Employer has established staffing levels at its facility. The ADON, not the LPNs, is responsible for the scheduling of CNAs, CMTs, LPNs, and RNs to meet these staffing levels. The ADON prepares a monthly staffing schedule and then prepares the

daily staffing log sheet using the monthly schedule. The ADON assigns CNAs, CMTs, LPNs and RNs to either Station A or Station B. CNAs and CMTs are primarily assigned to the Station they have worked on previously. The Employer also has an established number of breaks for CNAs and CMTs, and a 30-minute lunch period. LPNs do schedule CNAs and CMTs for breaks and lunch, though the record fails to reflect how the breaks and lunch periods are assigned. There is no evidence LPNs have denied breaks or lunches to a CNA or CMT, nor is there any evidence of an LPN adjusting an employee's break or lunch schedule. LPNs also do not approve vacations, sick leave, or other leave, nor do they monitor absenteeism.

When someone calls off, the LPNs are instructed to either borrow or transfer a CNA from a fully-staffed station or wing to the understaffed wing to cover for absences, or to work short staffed. The record reflects that temporarily moving CNAs or CMTs to a different wing is not a frequent occurrence. LPNs cannot permanently transfer CNAs or CMTs to another wing or to another shift. If there are not enough employees working to borrow one from another shift, and if working short will put the Employer below its required staffing levels, LPNs can call for volunteers from a list of employees, which is kept at the nurse's station. The list is not arranged in any particular order. The LPNs generally call employees who are known to be willing to come in to work on short notice. LPNs cannot require CNAs or CMTs to come in to work, nor can LPNs require that a CNA or CMT work after his or her regular hours to cover for an absent employee. If the LPN cannot find a replacement, the LPN contacts the ADON or the DON.

Once the ADON assigns the CNAs and CMTs to a particular wing, the LPNs are responsible for assigning CNAs to particular residents. The record reflects the primary goal in making such assignments is continuity of care. CNAs, therefore, are generally assigned to the same residents they have had the day before. LPNs also attempt to

equalize the workload among the CNAs scheduled to work on a particular shift by dividing the number of residents by the number of CNAs.

There is no record evidence that certain job duties assigned to CNAs and CMTs are more onerous than others, or that particular residents require different skills than others. The record reflects no evidence that the skills of the CNAs differ significantly, or that there is a significant difference between the job duties required when working on Station A as opposed to working on Station B. While the DON testified that some CNAs were better at performing their duties than others, the record fails to reflect any specific instances of LPNs making resident assignments based upon the skill or ability of the CNAs. The record also fails to reflect any specific evidence of an LPN assigning certain CNAs to particular residents because of the special needs of the resident.

B. Responsible Direction

The primary duty of the LPN is to ensure the CNAs and CMTs are providing proper patient care to the residents in accordance with established nursing standards. At the beginning of each shift, the LPN assigns the CNAs to a block of rooms and then gives the CNAs a "report" advising them of any incidents occurring with their residents and updating them on the residents' condition. After receiving the report, the CNAs go about their duties with little or no instruction from the LPN charge nurse. The CNAs know, for example, to bathe a resident a certain number of times a week based on an established bathing schedule, and to rotate a bedridden resident according to the posted rotation schedule. CNAs can also obtain additional information about a resident from cardexes kept at the nurse's station, which list the care plan for each resident. The ADON admitted the tasks performed by the CNAs in assisting residents with ADLs, such as feeding and bathing, are routine and occur on a daily or semi-daily basis. CNAs are prohibited from performing certain duties, including administering IVs and medications.

There is no evidence the LPNs can assign duties to the CNAs that do not conform to the Employer's written policies.

The LPNs, as noted above, make rounds of their respective wings twice each shift to monitor the care given to the residents by the CNAs. LPNs, however, do not directly observe the CNAs performing their duties, but rather check to see that the duties have been performed according to established polices and procedures. If the LPN determines that the proper care has not been given such as a resident not being rotated on schedule, or a CNA not changing a wet resident, the LPN will notify the CNA and tell the CNA what needs to be done to provide the proper care. CMTs and other CNAs can also request a CNA to perform a particular task to take care of a resident if they observe a resident is not receiving the proper care.

Not only do LPNs not directly observe CNAs performing their duties, but they also do not train the CNAs. CNAs are instructed in the performance of their tasks by the in-service coordinator who conducts all the orientations with new CNAs. The in-service coordinator, whose status is at issue here, conducts CNA classes and monitors the work of the CNAs on the floors.

The record reflects that during some shifts on the weekends, the LPNs are the highest-ranking employees at the facility, though it is not clear exactly how often this occurs. Either the DON or the ADON is on call at all times and available by telephone or cell phone. LPNs have been instructed to call the ADON or DON in case of unusual events, such as the death of a resident, a missing resident, and cases of suspected resident abuse. LPNs have also contacted the ADON or the DON when fire alarms have gone off, and to get staffing instructions when there are not enough employees working to meet the staffing levels for the fire code, or when one of the LPNs or a CMT has called off. There is no evidence of LPNs handling emergency situations or unusual situations

when acting as the highest ranking individual at the facility without first conferring with the ADON or DON for instructions.

LPNs can be held responsible for the failure of CNAs to provide residents with proper care, though the record fails to reflect this occurs on a frequent basis. The Employer presented four written counseling forms during the period from October 2001 through January 2004, in which the LPNs were held accountable for the poor condition of the residents on their shift, which resulted in part from the failure of the CNAs to perform their duties. One of the counselings resulted in a 2-day suspension, the others were considered verbal or written warnings. Two LPNs also received comments on their annual evaluations indicating they needed to better ensure the rules were being followed, including reducing the time spent by CNAs in the breakroom and keeping residents' rooms clean. The record fails to reflect what effect, if any, these comments had on the evaluations and the raises received by these two LPNs.

C. Discipline/Suspension/Discharge

LPNs have the authority to issue employee counseling forms. The LPNs generally fill out the section on the form that describes the conduct, but LPNs typically do not fill out the "resolution/action taken" section, nor do they check the boxes at the bottom of the form indicating what disciplinary action, if any, will be taken for future offenses. Further, the record reflects the checks at the bottom of the counseling forms are unreliable because sometimes the boxes are checked to indicate current discipline being issued, and sometimes the boxes are checked to represent future discipline which will result from further offenses.

The counseling form also contains a section at the top to check whether the incident is the first, second, or third offense. The record reflects the LPNs typically do not fill out this top section because they do not have access to employees' personnel files

when preparing counseling forms. Unless the LPN has written more than one counseling form on a particular CNA, the LPN would not be aware of other counseling forms given to the CNA. The counseling form does not contain a section for recommendations by the LPNs.

When the LPNs complete the counseling forms, they give them to the DON or ADON. A higher member of management such as the ADON or DON signs the counseling forms. The ADON or the DON presents the counseling form to the CNA, and reviews the form with the CNA. If a CNA protests the counseling form, the ADON or the DON meets with the CNA and the LPN involved to determine whether the counseling is warranted. Typically, the counseling forms are placed in the CNAs personnel file. The record reflects at least one instance where the ADON determined a counseling form was not warranted after talking to the CNA and other witnesses to the incident, and the form was not placed in the CNA's personnel file. The Employer's handbook also requires that the administrator review all counseling forms. The administrator did not testify, so there is no record evidence as to what type of review the administrator gives to the counseling form, or whether the administrator conducts any independent review of the incidents reported on the counseling form.

The counseling forms prepared by the LPNs do not have any impact on evaluations or raises. The record also fails to establish that counseling forms automatically lead to more severe discipline. While the Employer's handbook states that the first offense should result in a written verbal warning, the second offense in a written warning or suspension, and the third offense a 1 to 3-day suspension or termination, the record does not reflect any particular CNA receiving a certain type of discipline based solely on a certain number of counseling forms received. In Employer's Exhibit 9, an employee received two different counseling forms from the same LPN charge nurse for

the same type of offenses, committed only days apart. According to the handbook, the second counseling form should have resulted in a written warning or suspension. The DON or ADON, however, determined the second counseling form would only be considered a second *verbal* warning. In other examples of counseling forms presented by the Employer, Exhibits 6C, 7E, and 7G, the CNA did not appear to receive any type of discipline. The "resolution/action taken" section is not filled out on these forms nor are any boxes checked on the bottom indicating what discipline future offenses will result in. There are also no CNA signatures on any of these three counseling forms or any other indication the forms were actually presented to the CNAs. Further, the counseling form in 7G indicates it was the third offense for this CNA, yet there is no indication the CNA received a suspension or termination, or any other type of disciplinary action.

There is no evidence LPNs can suspend employees, or that they can effectively recommend suspension. In one example involving suspension, Employer's Exhibit 13, an LPN wrote a counseling form on a probationary CNA for patient neglect. The LPN first consulted with the ADON about the CNA's conduct, and then the ADON instructed the LPN to write the counseling form. The ADON, not the LPN, filled out the "resolution/action taken" section indicating the CNA was suspended pending investigation. The ADON, not the LPN, checked the boxes at the bottom of the form indicating suspension and discharge. The ADON also conferred with the CNA and other witnesses to the patient neglect prior to making a determination on what disciplinary action should be taken.

In another example, Employer Exhibit 6F, an LPN wrote a counseling form on a CNA for sleeping on the job and not providing care for the residents, which are violations of the Employer's established policies. The LPN did not fill out the "resolution/action taken" section of the form, and there is no evidence the LPN recommended what

disciplinary action should be taken. The CNA was suspended pending investigation. The DON at the time of this incident, Friday Marshall, testified without contradiction that when an LPN recommended suspension or discharge, the ADON or the DON conducted an independent investigation and did not rely solely on the LPN's recommendation.

Finally, in another example, an LPN testified she recommended a CNA be suspended for her conduct. There was no counseling form or other documentation presented with respect to this incident. The LPN stated she told former DON Marshall she did not want to work with the CNA over the weekend due to the CNA's conduct, and based on this "recommendation", the CNA was suspended. As noted above, however, former DON Marshall testified she conducted her own independent investigation into these incidents before deciding what disciplinary action, if any, to take. Thus, the record fails to establish that the CNA was suspended solely on the recommendation of the LPN.

LPNs occasionally send a CNA home for major infractions of established policies. Former DON Marshall, who was DON up until a few weeks before the hearing in this case, testified without contradiction that LPNs typically notified her first before sending someone home, and in all instances in which a CNA was sent home, Marshall would conduct her own independent investigation into the situation the following day and could reverse any actions taken by the LPN in sending the CNA home. The record further reflects that the CNA who is sent home does not automatically receive any disciplinary action, other than the counseling form. Finally, the record reflects that in at least one instance, an LPN asked that a CNA be sent home and this request was denied by the DON.

The counseling form in Employer's Exhibit 7C indicates in the "resolution/action taken" section that the CNA was sent home. The DON, not the LPN, completed this section of the form. The LPN also conferred with the DON regarding the CNA's conduct

and the DON instructed the LPN to send the CNA home. The LPN, an Employer witness, also admitted the ADON and the DON conferred with the CNA before deciding what disciplinary action, if any, to take. Friday Marshall, the DON at this time, stated she would have conducted an independent investigation of the incident before deciding what action to take. The counseling form in Employer's Exhibit 7D also states in the resolution section that the CNA was sent home. The ADON, not the LPN, filled out this section of the form. The LPN involved testified without contradiction that she did not recommend the CNA be sent home, and did not have a role in making the determination to send the CNA home.

In another instance, ADON Blissit filled out the counseling form in Employer's Exhibit 12 when she was an LPN charge nurse, noting a CNA failed to give any care to a resident lying on the floor bleeding, a blatant violation of the Employer's established policies. The record reflects this is the only counseling form written by Blissit in her 17 months as an LPN which indicates that a CNA was sent home. Blissit, however, conferred with the ADON about the CNA's conduct prior to writing out the counseling form. The ADON and the DON both signed the counseling form, and the ADON completed the resolution section of the form which states the CNA was sent home. The record reflects the ADON and the DON met with the CNA involved for 20 minutes before the CNA was eventually sent home. There is no evidence the ADON or the DON relied solely on the recommendation of LPN Blissit in sending the CNA home.

In addition to lacking the authority to suspend employees, the record reflects LPNs cannot terminate employees, nor can they effectively recommend termination. In one counseling form, Employer Exhibit 6A, an LPN noted that a CNA left work without permission, which is an automatic termination under the Employer's established written policies. The LPN signed the form but did not fill out the "resolution/action taken" section

or check any boxes at the bottom of the form. The DON and ADON then filled out a separate counseling form indicating the CNA was terminated for job abandonment. There is no evidence the LPN recommended termination, or that the LPN had any involvement in the decision to terminate the CNA.

The counseling form in Employer's Exhibit 6B states a CNA was argumentative and used foul language, which is gross insubordination under the Employer's established policies. The "resolution/action taken" section is not filled out and the "discharge" box is checked at the bottom, though it is not clear whether that box represented the discipline issued at the time, or what would be issued for future offenses. There is no evidence the LPN marked the "discharge" box, or that the LPN recommended discharge or had any role in determining what disciplinary action, if any, would result from the conduct reported on the counseling form. There is also no record evidence the CNA was actually discharged or received any other disciplinary action. This counseling form was signed by the former administrator who did not testify. Similarly, the CNA in 6C received a counseling form for sleeping on the job, which should result in an automatic termination under the Employer's policies. The record fails to reflect that the CNA was discharged or received any disciplinary action, or that any such disciplinary action was solely the result of an LPN’s recommendation.

In yet another example, Employer’s Exhibit 7B, the LPN noted that a CNA was a "no show/no call". The "resolution/action taken" section is not filled out, though the "discharge" box is checked at the bottom of the form. The LPN involved did not make any recommendation on discipline, and there is no evidence the CNA was actually discharged or received any other form of discipline.

D. Reward/Performance Evaluations/Bonus

The Employer contends the LPNs have the authority to reward CNAs through the performance evaluations and by occasionally recommending bonuses. The Employer's employees, including CNAs, receive an annual written evaluation on the anniversary of their hire date. The record reflects that some, but not all, of the LPNs complete the evaluations on the CNAs. While the current DON testified the LPNs complete an average of 15 evaluations a year, the LPNs who testified only completed an average of 1 evaluation per year. The current ADON testified she completed only one evaluation in her 17 months as an LPN charge nurse. The evaluation forms are signed by the ADON and sometimes the administrator, and sometimes, but not always, by the LPN. The ADON typically presents the evaluations to the CNAs. The evaluations are then given by the ADON to the office manager. The DON is responsible for evaluations of CMTs, and there is no evidence that LPNs complete evaluations on CMTs.

On the evaluation forms, the LPNs rate the CNAs on a scale from 1 to 5, with 1 being the highest and 5 being the lowest, in eight different categories including job knowledge, productivity, quality, and work habits. Each category contains a brief explanation. For example, “work habits” is explained as care of equipment, safe working practices, attendance, punctuality, and adherence to applicable policies and procedures. LPNs are not told that a certain numerical score based on the ratings in the eight categories will result in a certain percentage wage increase, nor are they given instructions on assigning numerical scores to the evaluations. LPNs do not make recommendations on wage increases, nor do they decide the amount of the merit wage increase given to the CNAs. These evaluations have no impact on discipline or on an employee's employment status. The LPNs who complete the evaluations do not have access to the CNA's disciplinary record or to the CNA's attendance record. The

evaluation form does have a space for comments and the LPN, the ADON, and/or the DON can write comments on the evaluation.

The evaluation form also contains a section for indicating the overall rating of the evaluation, with the choices of outstanding, very good, satisfactory, needs improvement, and unsatisfactory. This section is not typically filled out by the LPN. The record reflects only two instances in which an LPN filled out the overall rating section, and the record fails to reflect how the LPNs determined which overall rating to choose. The former DON, Marshall, and former ADON Shobe, both stated there was a "paper" they used to help in determining how to assign an overall rating to the evaluation. This "paper" was not submitted and the record does not reflect the exact nature of the criteria contained in this document. There is no evidence the overall evaluation ratings were linked to the numerical scores of the eight categories ranked by the LPNs. The record also fails to reflect what, if any, effect the overall rating has on the amount of the wage increase.

The record reflects the evaluations for CNAs have been handled differently depending on who the ADON, the DON, and the administrator were at the time of the evaluation. Former DON Marshall testified that under the prior administrator, the evaluations were not considered in determining the amount of wage increase given to the CNAs. The record reflects that under the present administrator, who has been with the Employer since July 2003, the evaluations are considered in determining whether the CNA will receive a wage increase ranging from 2 to 4 percent. Although there was testimony that wage increases of only 1 percent or no wage increase could be granted, the Employer presented no examples in which a CNA received a 1 percent raise or no raise at all based on an evaluation completed by an LPN. The current collective-bargaining agreement covering the CNAs provides for up to a 4-percent merit increase each year based on the CAN's evaluation.

The way in which the evaluation has been used to determine the amount of the wage increase, and how the evaluations are filled out, has also changed with a change in ADONs. The ADON is ultimately responsible for the evaluations of the CNAs. Former ADON Marshall, who was ADON until January 2003, testified LPNs assisted her in preparing the evaluations, and that Marshall considered not only the numerical ratings in the eight categories, but also the comments on the evaluations, and the CNAs' attendance record, which the LPN would not have access to, in determining the amount of the wage increase.

The testimony of former ADON Shobe, who was ADON from January 2003 until February 2004, was unclear as to how she determined the amount of the wage increase, and who completed the evaluations. ADON Shobe testified at one point that she "usually", but not always, gave the evaluations to the LPNs to fill out. Most of the evaluations submitted by the Employer were during Shobe's tenure as ADON, and as noted above, the LPNs who testified only completed an average of one evaluation per year. Former ADON Shobe also testified at one point that she "usually" relied on the numerical ratings, but the record does not reflect what else she might have relied on. The current ADON, Blissit, who became the ADON in February 2004 shortly before this hearing, did not testify to what she relies on in determining the amount of wage increases, and no evaluations were presented during her tenure as ADON.

The collective-bargaining agreement covering the CNAs provides that CNAs have the right to protest an evaluation. Former ADON Shobe testified that if a CNA protested the evaluation, she would meet with the CNA involved and review the evaluation with the CNA. Shobe testified she never "forced" an LPN to change a rating based on a meeting with a CNA, but the record does not reflect whether she ever suggested that a rating be changed, or whether she ever changed the amount of a wage increase based on a

meeting with a CNA. The record reflects at least one instance in which an LPN changed a rating in one of the eight categories after the ADON suggested the rating be changed.

The record fails to conclusively establish a direct correlation between the ratings in the eight categories and the specific amount of the wage increases. Both former DON Marshall and former ADON Shobe testified that they were never instructed to total the numerical ratings given by the LPNs for the 8 categories listed on the evaluations, and there is no evidence they in fact did so. None of the evaluations contain a numerical scoring. The Employer has no guidelines correlating a specific numerical rating with a specific percentage wage increase. The only explanation former ADON Shobe could give for how wage increases were determined was that a CNA who received all 5s marked in the eight categories would “probably” get no raise; CNAs with 4s would “probably” receive a 1-percent raise; CNAs with 3s would receive a 2-percent raise; and CNAs with 1s, 2s, and 3s would receive a 4-percent increase. Shobe did not state the requirements for a 3-percent raise nor did she explain how raises were determined when the evaluations contained a combination of these different ratings. The current ADON gave no testimony on scoring numerical ratings.

An analysis of the evaluations in evidence establishes no direct correlation between numerical ratings, the overall evaluation ratings, or the amount of the wage increase. If the numerical ratings for the eight different categories on the evaluations are totaled, the maximum number of points is 40 and the minimum number is 8, with the lower number of points reflecting higher ratings. In the evaluation numbered Employer's Exhibit 5N, the CNA received a total of 18 points, but received an overall rating of only "satisfactory", while the CNA in Exhibit 5I received a total of 21 points, a worse score than the CNA in 5N, but received a higher overall rating of "very good". The CNAs in Petitioner’s Exhibits 6D and 6F, with scores of 23 and 24, respectively, also were rated

“satisfactory”. The CNA in 5N with the satisfactory rating, however, received a 4-percent wage increase, while the CNA in 5I with a higher rating of "very good" received a lower increase of only 2.4 percent and the CNAs in Exhibits 6D and 6F received wage increases of 3 percent and 2 percent, respectively. There is no explanation for how an employee with only 18 points could receive such a low overall evaluation of only "satisfactory", or how a CNA with a rating of only "satisfactory" could receive the highest wage increase of 4 percent. Nor is there any explanation as to why the three CNAs rated “satisfactory” would all receive different increases. Former ADON Shobe testified that a CNA with a "satisfactory" rating should have received only a 3-percent increase and could not explain how the CNA in 5N received a 4-percent increase, admitting it was either a mistake, or someone made a decision.

The record further reflects that two CNAs who received the same total number of points, and the same overall evaluation rating, received two different wage increases. The CNA in Employer’s Exhibit 5M had 19 points, a rating of “very good”, and received a wage increase of 3 percent, while the CNA in Employer’s Exhibit 11 with the same number of points and the same overall rating received a wage increase of 4 percent. The record contains no explanation for this discrepancy. In both of these evaluations, the CNAs received the same combination of 2s and 3s, with five 2s, and three 3s in the eight categories. Similarly, the CNAs in Employer’s Exhibits 5A and 5N received the same number of points, 18, with the same combination of 2s and 3s, but with different ratings, 5A receiving a “very good” and 5N a “satisfactory”. However, the CNA in 5A, with the higher rating, received a 3-percent raise while the CNA in 5N received a 4-percent raise. The record again contains no explanations for these discrepancies.

In addition to the evaluations, the Employer presented three examples of CNAs receiving bonuses as examples of how LPNs can reward CNAs. These three examples,

Exhibits 7H, 7I, and 7J, are all employee counseling forms written on the same day by the same LPN, on which the LPN noted that three different CNAs worked short-staffed on a particular day without complaint. The record reflects the LPN conferred with the administrator about the possibility of something being done for these three employees, and the administrator, not the LPN, determined the three CNAs could receive $50 bonuses. The LPN then wrote on the counseling forms indicating the bonuses were being given per the administrator. There is no evidence the LPN recommended that a bonus be given, or what the administrator, who did not testify, relied upon in deciding to give these three employees a bonus. The same LPN later requested the administrator give a bonus to another CNA for working short-staffed without complaint, and the same administrator denied the request.

III. ANALYSIS OF LPN'S SUPERVISORY STATUS

The traditional test for determining supervisory status used for all employees, including health care professionals, is: (1) whether the employee has the authority to engage in any 1 of the 12 criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp*., 511 U.S. 571, 573-574 (1994). That the LPN charge nurses exercise their authority in the interest of the Employer is presumed since the LPNs attend to the needs of the nursing home's residents.

The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc*., 121 S. Ct. 1861, 1866 (2001). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital - Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess*

Hospital, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000). "Whenever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Job descriptions, relied upon by the Employer, are only paper authority and are not given any controlling weight by the Board. *Training School at Vineland*, 332 NLRB 1412, 1416 (2000); *Audubon Regional Medical Center*, 331 NLRB 374, 421 (2000).

As the Employer asserts the LPNs are supervisors, the Employer has the burden of proving their supervisory status. The Employer provides no evidence the LPN charge nurses can hire, transfer, layoff, recall, or promote employees, or effectively recommend such actions, or to adjust grievances. Therefore, this analysis is limited to whether LPNs can assign, responsibly direct, discipline, suspend, discharge, or reward employees, or effectively recommend such actions. I find the Employer has not met its burden with respect to these criteria.

A. Assignment of Work/Scheduling

The LPN's role in assigning work does not demonstrate supervisory status. The Employer argues the LPNs use independent judgment when they schedule lunches and breaks, temporarily transfer or assign CNAs to an understaffed wing, and call in replacements. The ADON, not the LPNs, schedules CNAs and CMTs for particular shifts and for particular stations or wings. LPNs do schedule breaks and lunch periods, but the record does not reflect how these breaks and lunches are scheduled, and the record

further reflects that the Employer has an established policy of providing CNAs with a certain number of breaks and a 30-minute lunch period. Implementing these directives from management does not demonstrate LPNs have supervisory authority in scheduling breaks and lunches. There is no record evidence of LPNs making adjustments to a CNA's or CMT's break or lunch schedule. Scheduling breaks and lunches, or even making adjustments to that schedule, is considered routine and does not require the use of independent judgment and, therefore, is insufficient to confer supervisory status on the LPNs. *Providence Hospital*, 320 NLRB 717, 732 (1996).

Similarly, the LPN's authority to temporarily assign or transfer a CNA to a different wing in the event another wing is short-staffed does not confer supervisory authority. The record reflects such transfers involve nothing more than a routine judgment as to the number of CNAs needed to serve a particular number of residents. See *Harborside Healthcare, Inc*., 330 NLRB 1334, 1336 fn. 12 (2000); *Northern Montana Health Care Center*, 324 NLRB 752, 754 (1997). LPNs cannot permanently transfer a CNA to another wing or another shift. Further, the Employer stipulated that LPNs do not have the authority to transfer employees within the meaning of Section 2(11) of the Act.

When seeking replacements, LPNs randomly call CNAs who are commonly known to work on short notice, or they ask for volunteers from the previous shift to stay and work over. One LPN testified without contradiction that LPNs must obtain permission from higher management, such as the ADON or DON, before asking someone to stay late. LPNs cannot direct CNAs or CMTs to come in to work or to remain late, even when short-staffed. Calling in employees or randomly selecting volunteers, without the ability to compel an employee to come to work or to compel overtime, does not confer supervisory status on the LPN charge nurse. *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998), enfg. *Beverly Enterprises-*

Minnesota, Inc., 323 NLRB No. 200 (2000); see also *Harborside Healthcare, Inc*., supra at 1336.

The Employer argues, in its brief, that the collective-bargaining agreement covering the CNAs and CMTs requires that overtime for CNAs and CMTs be assigned by seniority, and if all employees refuse to work, overtime is assigned to the least-senior CNA, and that this establishes LPNs do have the authority to assign overtime. Contrary to the Employer's contentions, this contractual provision on overtime does not establish that LPNs are the ones who "assign" this overtime. As noted, there is no record evidence that LPNs have the authority to require CNAs or CMTs to work overtime, and thus there is no evidence LPNs can assign overtime by seniority or otherwise.

Similarly, the LPNs' assigning CNAs to a block of rooms does not confer supervisory status. CNAs are typically assigned to the same residents they have had the previous day, to ensure patient-care continuity. Resident assignments are also made in such a way as to evenly distribute residents among the available staff. Such assignments, made by equalizing employees' workload on geographic, numerical, or other rational basis, are considered routine assignments and do not confer supervisory status on the LPNs. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *King Broadcasting Co., d/b/a KGW-TV*, 329 NLRB 378, 382 (1999). Even, assuming the record established the LPNs reassigned CNAs to accommodate a resident's needs, the reassignment of CNAs to meet the needs of a difficult resident does not require the exercise of independent judgment and, therefore, is not considered a supervisory duty. *Harborside Healthcare, Inc*., supra at 1336 fn. 12; *Marion Manor For the Aged and Infirm, Inc*., 333 NLRB 1084, 1089 (2001).

Further, assignment power is supervisory where the purported supervisor exercised independent judgment or discretion in making assignments based on his or

her own assessment of an employee. Independent judgment is demonstrated by evidence that an individual has discretion to assign work of differing degrees of difficulty or desirability on the basis of his or her own assessment of an employee's ability or attitude. If the assigned tasks are so routine that they do not require a purported supervisor to differentiate between employee skill levels, the individual making the assignments will be found to be nonsupervisory. See *Patagonia Bakery Co., Inc*., 339 NLRB No. 74, slip op. at 1, fn. 1, 21 (2003). Similarly, where an individual's assignment power is circumscribed by established company policy or higher authority, the individual has been held to be nonsupervisory. See *Halpak Plastics, Inc*., 287 NLRB 700, 706 (1987).

There is no specific record evidence of an LPN making an assignment based on an assessment of the CNA's skills. There is also no evidence that the CNAs' skills differ significantly. The tasks performed by the CNAs and CMTs are repetitive and routine in nature and the CNAs and CMTs are well aware of the tasks that they need to perform. The record does not reflect that the medical condition of the residents changes significantly from day to day or even week to week or that any changes in medical condition impact the duties to be performed by the CNAs and CMTs. The record also fails to establish that any of the assignments of CNAs to particular residents, particular rooms, or to a particular wing are more desirable than others, or that LPNs have the power to favor or disfavor a CNA or CMT in making such assignments. The absence of such specific evidence is construed against the Employer. *Michigan Masonic Home*, 332 NLRB 1409 (2000). Finally, there is no evidence LPNs can assign CNAs or CMTs tasks that are outside of the Employer's established policies or procedures, and thus the assignment power of the LPNs is circumscribed and does not reflect the use of independent judgement. The authority to assign work, alone, without the use of

independent judgment, is not indicative of supervisory authority. *McGraw-Hill Broadcasting Co., Inc.,* 329 NLRB 454, 456 (1999).

B. Responsible Direction

An employee who responsibly directs with independent judgment within the meaning of Section 2(11) of the Act, is one who has: (1) been delegated substantial authority to ensure a work unit achieves management's objectives and is thus "in charge"; (2) is held accountable for the work of employees in the unit; and (3) exercises significant discretion and judgment in directing his or her work unit. While the Employer presented some evidence the LPNs meet the criteria listed in the first two factors, the Employer has not met its burden in establishing the LPNs meet the third factor of exercising independent judgment.

With respect to the first factor, LPNs are expected to ensure the CNAs assist residents in performing activities of daily living such as feeding and bathing, and to ensure the Employer's established policies and procedures are being followed. LPNs are expected to make action rounds to monitor the work of the CNAs, and can write up a counseling form on a CNA who has not provided the residents with the proper care. Frequently, the LPNs are the highest authority at their assigned station and, at times, they are the highest authority at the facility.

With respect to the second factor, the Board has considered accountability in deciding whether individuals are supervisors. Individuals working in nursing homes, for example, who were not fully accountable for the work of the employees under them were found not to be supervisors. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). There is some evidence the LPNs here are held accountable for the work of the CNAs they are supposed to monitor. At least four LPNs were given counseling forms for transgressions which included the failure of the CNAs to give proper care to the residents

on their shift and one of these LPNs received a suspension. The LPNs are also evaluated on how well they ensure the CNAs give the proper care. Two LPNs had comments on their evaluations noting they needed to spend more time ensuring the CNAs performed their duties properly, though the record did not reflect whether the LPNs received a lower overall evaluation rating or a lower percentage wage increase as a result of these comments. Thus, there is some evidence of accountability.

Assuming the LPNs meet the first two criteria and therefore responsibly direct the work of the CNAs and CMTs who work with them, the LPNs are not supervisors because they do not exercise independent judgment, the third factor, in directing the CNAs and CMTs. Being able to direct certain tasks, and being held accountable for the performance of those tasks, alone, does not establish that the LPNs exercise independent judgment in responsibly directing the work unit.

While the LPNs do monitor the work of the CNAs and CMTs to ensure they follow the Employer's policies and procedures, this responsibility does not require the exercise of significant discretion and independent judgment. While LPNs can point out tasks that the CNAs have not performed properly, the ability to make sure CNAs and CMTs perform their duties and to call their attention to a particular task that has not been performed properly, does not require independent judgment. *Franklin Home Health Agency*, supra at 831; *Beverly Health and Rehabilitation Services, Inc.,* 335 NLRB 635, 669 (2001). The record also reflects the Employer has established policies which delineate what tasks can be performed by the CNAs and CMTs, and the record fails to reflect that LPNs can deviate from established protocols or standard operating procedures in directing the CNAs and CMTs to perform certain tasks. As noted below, while LPNs issue counseling forms, they do not determine what disciplinary actions, if any, will be taken against a CNA or CMT who has not followed the established protocols or procedures. In addition, LPNs

do not approve overtime, vacation, sick leave, or other time off, nor do LPNs schedule employees. LPNs cannot require a CNA or CMT to work late or come in to work, even when short-staffed.

While LPNs are sometimes the highest ranking individual on weekends, there are no specific instances of LPNs handling emergencies or unusual circumstances on their own. In unusual situations, such as the death of a resident, or cases of suspected abuse of a resident, LPNs are instructed to call the ADON or the DON, who are always on call. Merely notifying a supervisor of an emergency or unusual situation, without assuming any other role in deciding how to resolve the situation, is insufficient to confer supervisory status. *Chevron Shipping Co.,* 317 NLRB 379, 381 (1995); *Northcrest Nursing Home*, 313 NLRB 491, 498 499 (1993). Also, having the ADON and the DON available is further evidence that the LPNs do not exercise independent judgment. *Waverly-Cedar Falls Health Care,* 297 NLRB 390, 392 (1989).

Finally, LPNs do not use independent judgment in directing the CNAs and CMTs because the tasks they direct the CNAs and CMTs to perform are routine and repetitive in nature, and require little discretion. There is no evidence the LPNs' direction of the CNAs and CMTs involves other than routine aspects of patient care, such as taking residents' vital signs, assisting residents with tasks of daily living, and ensuring that care plans are followed. CNAs and CMTs are familiar with the tasks they are assigned and require little further instruction in carrying out their tasks. Directing CNAs and CMTs to perform tasks that are routine and familiar does not required the use of independent judgment. *Beverly Health and Rehabilitation Services, Inc.,* 335 NLRB 635, 669 (2001); *Evangeline of Natchitoches, Inc.,* 323 NLRB 223, 223-224 (1997). Accordingly, I have concluded that any judgment used by the LPNs to assign work and direct CNAs and CMTs to perform discrete tasks is sufficiently curtailed by the Employer's established policies and

procedures, and the tasks are of such a routine nature, that the degree of judgment used to direct such tasks falls short of the independent judgment required for supervisory status. *NLRB v. Kentucky River Community Care*, 532 NLRB 706 (2001); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

C. Discipline/Suspension/Discharge

The LPNs' authority to issue employee counseling forms does not confer supervisory status on the LPNs. While LPNs do fill out the counseling forms indicating a CNA has violated the Employer's established policies and procedures, the record fails to reflect that the counseling forms themselves constitute disciplinary action, or that they automatically lead to more severe discipline. Authority to issue verbal and written warnings, or written counselings, does not confer supervisory authority where they have no clear connection to more serious disciplinary action or tangible effect on the employee's job status. See *Green Acres County Care Center*, 327 NLRB 257, 257-258 (1998).

There is also no evidence the LPNs effectively recommend discipline. The authority to effectively recommend means that the recommended corrective action is taken without any independent investigation by a higher authority, not that the recommendation was eventually followed. *Children's Farm Home,* 324 NLRB 61 (1997). Here, the record fails to establish that any recommendations made by LPNs on disciplinary actions are accepted without any independent investigation or review into the incident by higher management officials. Where oral or written reports simply bring substandard performance to the Employer's attention, and where an admitted supervisor conducts an independent investigation and determines what, if any, disciplinary action will be given, the LPN's role in advising the supervisor of the conduct, or merely reciting the

conduct in a counseling report, is merely a reportorial function. *Passavant Health Center*, 284 NLRB 887, 891 (1987).

The record does not establish that the LPNs have suspended CNAs or CMTs on their own authority. The record reflects in the few instances where LPNs have recommended CNAs or CMTs be suspended, the ADON or the DON meets with the CNA or CMT involved and conducts an independent investigation into the incidents leading up to the issuance of the counseling form. There is no record evidence of a CNA or a CMT being suspended solely on the recommendation of an LPN.

While there is some evidence LPNs can send CNAs home for flagrant or egregious conduct, such action is insufficient to demonstrate supervisory authority. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Phelps Community Medical Center*, 295 NLRB 486, 492 (1989). Sending employees home for flagrant violations is not indicative of supervisory status because the offenses are such obvious violations of the Employer's established rules that no independent judgment is involved in the decision. *Michigan Masonic Home,* 332 NLRB 1409, 1411, fn. 5 (2000). Further, the former DON testified that when LPNs do send a CNA home for flagrant violations of the Employer's written policies, the DON conducts a separate investigation to determine if any discipline is warranted, and can reverse whatever actions have been taken by the LPN. The record also fails to establish that sending an employee home automatically results in disciplinary action.

With respect to termination, the record reflects LPNs do not have the authority to terminate an employee, nor can they effectively recommend termination. While the Employer presented some counseling forms written by LPNs that had "discharge" marked at the bottom, or "suspending pending termination" or "discharge" written in the resolution section, the ADON or DON made the determination to terminate the individual

and were the ones to mark termination or discharge on the counseling forms. Further, the DON or the ADON would also conduct an independent investigation into the incidents leading up to the counseling form to determine whether discharge was warranted. There is no record evidence that an LPN ever recommended discharge, or that a CNA or CMT was terminated solely upon such recommendation. Therefore, LPNs do not effectively recommend discipline because admitted supervisors independently review the disciplinary action before making decisions regarding the discharge of a CNA. *Northcrest Nursing Home,* 313 NLRB 491, 497 (1993).

D. Reward/Performance Appraisals/Bonus

The LPNs' role in completing the CNAs' evaluations does not confer supervisory status. The Employer failed to present evidence conclusively establishing a direct link between the numerical ratings and the amount of specific wage increases. The Employer does not maintain any guidelines that establish any direct correlation between a specific numerical rating and a specific wage increase, nor is there any evidence as to precisely what methodology the former ADON used to determine the amount of a CNA's wage increase. The record also does not reflect what methodology will be used by the current ADON. The evaluations submitted by the Employer do not reflect any numerical scoring, nor do they reflect that a particular wage increase correlated to a particular score. Additionally, LPNs have not been instructed to assign numerical scores to evaluations, nor have they been instructed that a particular numerical score relates directly to a particular percentage wage increase. The evidence, therefore, supports a conclusion that any performance evaluations completed by the LPNs were reportorial in nature and not supervisory. *Harborside Healthcare, Inc*., 330 NLRB 1334, 1335 (2000); *Elmhurst Extended Care Facilities, Inc*., 329 NLRB 535, 537 (1999).

The cases cited by the Employer, *Bayou Manor Health Center, Inc*., 311 NLRB 955 (1993), *Trevilla of Golden Valley*, 330 NLRB 1377 (2000), *Hillhaven Kona Healthcare Ctr.,* 323 NLRB 1171 (1997), and *Cape Cod Nursing & Retirement Home*, 329 NLRB 233 (1999) are clearly distinguishable. In each of those cases, the particular numerical scores given by the LPNs on the evaluations directly correlated to a specific percentage wage increase, and in some cases, to a particular employment action such as probation if the ratings were too low. For example, in *Trevilla of Golden Valley*, numerical scores of 75 to 100 resulted in a 4-percent increase, scores of 50 to 74 resulted in a 3-percent increase, and so on. In addition, employees who received below 30 points were given no raises and were put on probation. Unlike the cases cited by the Employer, there is no evidence of the application of any formula or methodology being applied uniformly to the evaluations to arrive at particular wage increases. Thus, I cannot conclude, based on the record evidence, that the numerical ratings on the evaluations directly correlate to a particular wage increase.

With respect to bonuses, the Employer did present evidence that on one day, an LPN requested that the administrator reward three employees for working short staffed without complaint. The LPN did not recommend any particular reward. The administrator, who did not testify, gave a $50 bonus to these three employees. The record does not reflect what effect the LPN's request that these three employees be rewarded had on the administrator's decision to award bonuses to these employees, or what else the administrator might have relied upon in making her decision. The record also reflects the same LPN requested at a later date that other employees be given a bonus for working short-staffed, and the request was denied by the administrator. Thus, the record fails to establish that LPNs can effectively recommend awarding bonuses to CNAs.

E. Conclusions

The LPNs do not assign, responsibly direct, discipline, suspend, discharge, or reward employees with the requisite degree of independent judgment. Therefore, I find the Employer has not met its burden of proof to demonstrate the LPNs are statutory supervisors. Accordingly, the non-department head LPNs are appropriately included in the unit.

IV. STATUS OF IN-SERVICE COORDINATOR

The Petitioner contends that the in-service coordinator should be included in the unit because she is an LPN and not a department head. The Employer admits that the in-service coordinator is an LPN but contends that she is also a department head and should be excluded from the unit as a supervisor pursuant to the parties' stipulation. At hearing, the Employer and the Petitioner stipulated that the department heads, including any LPNs and/or RNs serving in any department head capacity, are supervisors within the meaning of Section 2(11) of the Act. This stipulation, lacking any factual detail, is entirely conclusional, and I do not accept it as it applies to the in-service coordinator. The in-service coordinator appears to be a department head. At hearing, she admitted that she has this title and that she attends department head meetings. However, the record does not reflect what supervisory authority the department heads possess warranting their exclusion as supervisors and whether or not the authority of the in-service coordinator differs from that of other department heads, and I note that there are no other employers in the “department” headed by the in-service coordinator. Further, the record does not establish whether the in-service coordinator should be excluded on the Employer’s claim that she is a managerial employee or lacks a community of interest. Accordingly, I find that the record is insufficient to determine the unit placement of the in-

service coordinator and I shall permit the in-service coordinator to vote subject to the Board's challenged ballot procedures.

V. APPROPRIATE UNIT

The Employer contends that if the LPNs are found not to be supervisors, and I have concluded they are not, the only appropriate unit must include the RNs and the LPNs because they are all classified as charge nurses, perform the same duties, and therefore share the same community of interest. However, the Board routinely finds RNs to be professional employees. *Centralia Convalescent Center,* 295 NLRB 42 (1989). Nothing in this record distinguishes the Employer's RNs from any other RNs. Thus, the Employer's RNs have nursing degrees and are licensed registered nurses. I must conclude, therefore, that the Employer's RNs are professional employees. The Board also routinely finds that LPNs are not professional employees. Rather, the Board normally finds LPNs to be technical employees. See *Park Manor Care Center Inc*., 305 NLRB 872 (1991). Again, nothing in this record distinguishes the Employer's LPNs from any other LPNs; all of them are properly licensed as LPNs. In view of this precedent, and in the absence of any evidence that the LPNs are professional employees, I conclude the LPNs are nonprofessionals.

Section 9(b)(1) of the Act provides that professional employees may not be included in a bargaining unit with nonprofessionals unless they vote in favor of such inclusion. In *Leedom v. Kyne*, 249 F.2d 490 (D.C. Cir. 1957), the Court of Appeals construed the limitation of Section 9(b)(1) as intended to protect professional employees and held that professional employees' right to this benefit does not depend on Board discretion or expertise and that the denial of this right must be deemed to result in injury. The United States Supreme Court, at 358 U.S. 184 (1958), affirmed this ruling. Thus, the operative effect of Section 9(b)(1) is that a mixed professional-nonprofessional unit

cannot be found, as a matter of law, to be the sole appropriate unit for collective-bargaining purposes. Otherwise, the statutory limitations set forth in Section 9(b)(1) would be without meaning since professional employees would either have to be represented as part of an overall unit, or not at all. *South Hills Health System Agency*, 330 NLRB 653 (2000). Accordingly, I find that the petitioned-for unit limited to LPNs is appropriate.

VI. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.[1]

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time LPNs employed by the Employer at its St. Louis, Missouri facility,[2] EXCLUDING office clerical and professional employees, guards, and supervisors[3] as defined in the Act, and all other employees.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers Union Local No. 655, AFL-CIO. The date, time, and place of the

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[1] The parties stipulated that the Employer, a Missouri corporation with its principal offices located in St. Louis, Missouri, is engaged in providing care for nursing home residents. During the past 12 months, which period is representative of the Employer's operations, the Employer derived gross revenues in excess of $1,000,000 from the operation of its nursing home, and purchased and received goods, supplies or materials valued in excess of $50,000, which were shipped directly to the Employer's facility from suppliers located outside the State of Missouri, which suppliers, in turn, received such goods, supplies or materials directly from points located outside the State of Missouri. The parties further stipulated the Employer is engaged in commerce within the meaning of the Act.

[2] Because the record evidence is inconclusive as to the in-service coordinator, the in-service coordinator may vote subject to the challenge procedures.

[3] The parties stipulated the following individuals are supervisors under Section 2(11) of the Act and should be excluded from the unit: the administrator, the DON, the ADON. The record establishes that these individuals have the authority to discipline and reward employers. Accordingly, and in agreement with the parties, I find that the administrator, DON and ADON are supervisors and I shall exclude them from the unit.

election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers, but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military service of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 *NLRB* 1236 (1966); NLRB v. *Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility,* 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 1222 Spruce Street, Room 8.302, St. Louis, MO 63103, on or before **March 26, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (314) 539-7794 or by electronic mail at Region 14@nlrb.gov. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day the election if it has not received copies of the

election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m. EST on **April 2, 2004**. This request may not be filed by facsimile.

Dated: March 19, 2004
at: St. Louis, Missouri

_____
Ralph R. Tremain, Regional Director
National Labor Relations Board, Region 14

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